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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.M., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.M.,

Defendant and Appellant.

B207743
(Los Angeles County
Super. Ct. No. CK68685)

APPEAL from an order of the Superior Court of Los Angeles County. Terry T. Truong, Referee. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Respondent P.L.

* * * * *

INTRODUCTION

Father appeals from an order of the juvenile court terminating dependency jurisdiction and awarding sole physical custody of the dependent minor to father, with joint legal custody to both parents. He contends that the court abused its discretion in awarding joint legal custody, claiming the court gave insufficient consideration to mother's mental health. We disagree and affirm the order.

BACKGROUND

1. *Detention*

In late May 2007, the Department of Children and Family Services (DCFS or Department) detained K.M. at the hospital shortly after her premature birth due to information that mother was depressed, with possible suicidal ideation. Mother was transferred to a mental health facility for evaluation pursuant to Welfare and Institutions Code section 5150.¹ After her release a few days later, mother's mother (maternal grandmother) dropped her at the hospital to visit K.M. but did not return for her, and mother spent the night in the hospital waiting room. As mother was herself a minor, K.M.'s social worker (CSW) took mother into temporary protective custody and placed her in foster care, in order to facilitate visits with the baby.

On June 7, 2007, the Department filed a petition to bring K.M. within the jurisdiction of the juvenile court.² The same day, the court entered an order detaining K.M.³

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² The petition was subsequently amended twice, with the second amended petition filed July 31, 2007, at the time of the contested jurisdiction hearing.

³ On the day of the detention hearing, mother and father filed separate parental notifications of Indian status. Father claimed no Indian ancestry, but mother indicated that she might be a member or eligible to be a member of the Cherokee and Blackfeet Tribes. This notification triggered the notice requirement of The Indian Child Welfare Act (ICWA) 25 U.S.C. § 1901 et seq. (See 25 U.S.C. § 1912(a).) The court ordered

On June 15, 2007, the CSW reported that mother was a minor, 15 years old at the time of detention, and the subject of an open juvenile dependency case alleging neglect. Mother had failed to seek prenatal care and suffered severe hypertension and toxemia. As a result, K.M. was born by emergency C-section. Mother lived with maternal grandmother, who had threatened to abscond with K.M. and had made threats against father. Maternal grandmother suffered from bipolar disorder, and the CSW had received a report that she was affiliated with a gang. K.M.'s father was also a minor, 16 years old at the time of detention. Both parents had a history of drug use.

Father requested that K.M. be placed with his parents, paternal grandmother and paternal stepgrandfather. The CSW reported that the Department had completed an inspection of the paternal grandparents' home and found it suitable for placement. The paternal grandparents had no criminal record and no previous involvement with DCFS. The Department recommended placing K.M. with them.

Mother's and K.M.'s medical records were submitted to the court prior to the hearing of June 15, 2007. The records showed that mother had been discharged from the mental health facility after three days, and that the attending physician had found that she suffered from recurrent moderate depression, without psychosis or suicidal ideation. She was referred to a therapist but prescribed no medication, since she wanted to breastfeed. K.M. was discharged from the hospital June 5, 2007, after spending 10 days in the neonatal intensive care unit.

The juvenile court ordered K.M. released to the home of father and the paternal grandparents and ordered father to submit to random drug tests. Adjudication of the

the Department to serve the required notices, but it does not appear from this record that the Department did so, and its postdisposition reports stated that ICWA did not apply. None of the parties raised the issue, and we do not address it, because the omission appears to be harmless, as K.M. was placed with her father and his parents within 10 days of her release from the hospital. (See *In re Alexis H.* (2005) 132 Cal.App.4th 11, 15-16.)

petition was continued, and the issue referred to mediation. The matter was continued again and heard July 31, 2007.

2. *Adjudication and Disposition*

The evidence admitted on the issue of jurisdiction consisted of the DCFS report of June 7, 2007, two DCFS reports dated June 15, 2007, and two reports dated July 31, 2007, in addition to mother's and K.M.'s medical records. Prior to the hearing, the Department reported that the parties had agreed on a visitation schedule that allowed mother to visit K.M. at paternal grandparents' home two days per week and at the Fox Hills Mall for two hours on Sunday. Father had enrolled in a parenting course, and mother was on a waiting list for one. Both parents had submitted to drug tests, with negative results. Paternal grandmother had been very accommodating for mother's visits.

The court dismissed the two counts alleged against father in the second amended petition. Mother submitted the matter on the DCFS reports, and the court sustained counts b-1 and b-4 as to her.⁴ The court adjudicated K.M. a dependent of the juvenile court, placed her in father's home under DCFS supervision, and ordered reunification services for mother.

⁴ Count b-1 alleges: "[M]other . . . suffers from mental and emotional problems including depression. Further, on 5/30/07, the mother was hospitalized for the evaluation and treatment of her psychiatric condition. The mother's mental and emotional problems periodically limit the mother's ability to provide regular ongoing care and supervision of the child. Such mental and emotional problems . . . endanger the child's physical and emotional health, safety and well-being and place the child at risk of physical and emotional harm, damage and danger."

Count b-4 alleges: "[M]other . . . failed to receive prenatal care for the child, resulting in the mother suffering from severe hypertension and toxemia. Consequently, the mother received an emergency C-Section. Further, [K.M.] was born premature [and] had feeding problems and difficulty breathing, which resulted in her remaining in . . . intensive care . . . for an extensive period of time. Said conduct by the mother endangers the child's physical and emotional health and safety, placing the child at risk of physical and emotional harm and damage."

The case plan was approved. Mother was ordered to enroll in parenting classes and individual counseling, to have 10 weekly consecutive random negative drug tests, or to enroll in a drug program, to see her psychiatrist as recommended, and to take medication as prescribed. Father was ordered to enroll in an infant parenting course. The court ordered monitored visits for mother with a DCFS-approved monitor (not father), with discretion in the Department to liberalize visits. The court adopted the mediated visiting schedule and ordered the Department to pay mother's costs of transportation and to provide transportation information.

The court scheduled a progress review hearing for October 15, 2007. In addition, the court scheduled a six-month review hearing for January 29, 2008.

3. *Progress Hearing*

On October 15, 2007, the Department reported that mother had taken three negative blood tests but had failed to show for two tests. Mother had enrolled in individual counseling, attended three sessions, and missed three. Mother's visits with K.M. were random and inconsistent. Father had completed a Teen Enhancement Program and was soon scheduled to complete an infant and child CPR class. He had successfully completed all court-ordered drug tests.

Mother's counsel explained to the court that school had begun, and that mother had long commutes to school and father's home. She had to rise at 3:30 or 4:00 a.m. to get to school and could no longer go to father's home during the school day. He requested a meeting to devise a new visitation schedule. The court agreed and ordered a team decision meeting (TDM) with mother to be attended by the CSW, father, paternal grandmother, maternal grandmother, and if possible, by mother's therapist by telephone. The court ordered the Department to submit a progress report by November 15, 2007. At that time, the Department reported that mother had enrolled in a high school closer to her home and that the teachers would accommodate her visitation schedule, which had been changed to Wednesdays and Sundays.

4. Six-month Review Hearings

On January 29, 2008, the Department reported that a TDM was held two weeks before the hearing, attended by mother, father, paternal grandparents, and maternal grandmother. All except maternal grandmother agreed to recommend termination of juvenile court jurisdiction, with K.M. to reside with father and paternal grandparents.

The Department also submitted a progress letter from mother's therapist. Mother had attended therapy at The Guidance Center in August, but her therapist left the agency after one month. Mother began with a new therapist January 3, 2008, and consistently attended twice a week. The new therapist reported that mother participated fully and appeared to be benefitting from treatment. Mother completed her drug tests with all negative results. Although she missed six visits, mother had mostly complied with the revised visitation schedule. The CSW reported that mother interacted well and appropriately with K.M. during the visits, and that K.M. responded to her, as well. However, mother had failed to complete a parenting course, had moved several times, and had failed to keep the Department informed of her whereabouts.

Mother told the CSW that the "best place" for K.M. was with father and paternal grandparents. She acknowledged to the CSW that her home was unstable and would not be a good placement for K.M. Mother had changed schools frequently and was not currently enrolled. She was living with maternal grandmother, who had an extensive criminal history. Due to mother's instability, she had had no overnight visits with K.M. The CSW was of the opinion that K.M. would not be safe in mother's care.

Father had complied with all court orders. He was attending high school and working part-time for paternal grandfather. Father participated in K.M.'s daily care and supervision. In the CSW's opinion, he and K.M. had a very strong bond, and that despite his youth, father had made every effort to provide her with emotional, physical, and financial support.

The Department recommended that jurisdiction be terminated, that a family law order be issued, giving father full custody of K.M., and that the current visitation schedule remain in place. The court continued the matter to March 24, 2008, for a contested six-month review hearing, and then to March 25, 2008.

In the March progress report, the Department stated that mother had completed a parenting course. In addition, the Department reported that although mother had missed some therapy sessions, her therapist reported that she was doing well in her therapy, and making progress toward her goals and objectives. Mother was on juvenile probation, had missed contacting her probation officer, and her school attendance had been inconsistent.

At the March hearing, the court ordered the parties into mediation, and continued the six-month review hearing to May 8, 2008, with a progress report due on May 6, 2008.

5. Termination of Jurisdiction

On May 6, 2008, the CSW reported that she had met with mother and paternal grandmother to discuss which maternal relative should be appointed to monitor mother's visits. Mother told the CSW that the only relative she would trust with K.M. was S.S., whom she identified as her stepmother. S.S.'s criminal record showed just two misdemeanor convictions in 1998 and 1999. The CSW reported that paternal grandmother went to the zoo with mother, K.M., and S.S., and found S.S. "nice and appropriate during the visit."

The Department reported that mother continued to struggle to comply with the visitation order, due to distances and lack of support at home. Mother stated many times to the CSW that she felt that K.M. was well taken care of and that the best place for her was with father. Mother told the CSW that she was confident that father and paternal grandparents would not deny her access to K.M. Father and paternal grandparents agreed that they would not do so, and they made every effort to facilitate visits.

On May 8, 2008, the court terminated jurisdiction and entered a custody order pursuant to section 362.4.⁵ Father was awarded sole physical custody of K.M., while both parents were given joint legal custody. The court ordered a detailed schedule for mother's monitored visits and approved S.S. as a monitor. Father objected to joint legal custody, citing *In re Jennifer R.* (1993) 14 Cal.App.4th 704 (*Jennifer R.*), and filed a timely notice of appeal the same day.⁶

DISCUSSION

Father contends that the grant of joint legal custody was an abuse of discretion and unsupported by substantial evidence. "Joint legal custody' means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3003.)

Custody orders are reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) An abuse of discretion must be clearly established, and "a reviewing court will not disturb [a custody] decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." [Citations.] (*Ibid.*) Further, an order terminating dependency jurisdiction and entering a custody order pursuant to section 362.4 is reviewed for an abuse of discretion, not for substantial evidence, as father contends. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.) However, a custody decision lacking any reasonable basis in the record would be an abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067-1068; cf. *Jennifer R.*, *supra*, 14 Cal.App.4th at pp. 711-713 [applying both standards].)

⁵ Section 362.4 authorizes the juvenile court to make a custody order upon termination of jurisdiction and provides that the order may be filed in family court in order to initiate a custody proceeding.

⁶ Father cited *Jennifer R.* for its holding that there is no presumption favoring joint custody in juvenile dependency cases. (See 14 Cal.App.4th at p. 712.)

Father argues that the evidence showed mother was a danger to K.M., because she had insufficient mental stability to warrant unsupervised visits with her. Similarly, father argues, there was insufficient evidence of mental stability to justify allowing mother to participate in making significant decisions about K.M., or to interfere with father's choices. Father contends that the facts of this case are similar to those of *Jennifer R.*, *supra*, 14 Cal.App.4th 704, in which an award of sole legal custody to the father was upheld on appeal. We disagree. In that case, there was substantial evidence of mother's threats to take the child, her failure to follow through on drug rehabilitation referrals and required drug tests, her irregular visitation, her inappropriate behavior during visitation, an extensive history of serious mental illness, significant emotional disturbances, and developmental disabilities. (*Id.* at p. 713.)

There were no such egregious facts here. What father terms "mental instability" was, as alleged in the sustained petition and shown by the evidence, recurrent moderate depression that periodically limited mother's ability to provide regular ongoing care and supervision. Those facts supported the court's order that all visits continue to be monitored. However, the court's conclusion that mother was not ready to provide regular care or supervision does not compel a finding that mother's occasional moderate depression also limited her ability to participate in decisionmaking. Further, the evidence showed that mother *was* able to participate in decisionmaking. During the summer of 2007, mother was able to come to an agreement with father and paternal grandmother on a visitation schedule, and later, when mother's school schedule interfered with visiting, she was able to come to an agreement with them on a new visitation schedule.

Father contends that mother's ability to work out visitation issues related only to her own convenience, and did not show that she would be able to engage in joint decisionmaking with regard to K.M.'s best interests. In fact, mother did demonstrate an ability to make decisions in K.M.'s best interest. Mother was able to agree with father and paternal grandmother that K.M. should reside with father and paternal

grandparents. She was able to think through and acknowledge the disadvantages of caring for K.M. in her own home due to the instability of her home life, her scheduling difficulties, and the lack of family support. She was able to select an appropriate monitor. Further, neither father nor paternal grandmother ever suggested that mother interfered with K.M.'s care. In fact, they offered to have mother live with them and told the CSW that they intended to involve mother in K.M.'s care and upbringing.

In addition, the CSW recommended joint legal custody, and the court was entitled to give great weight to the CSW's assessment. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53; see also *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1427 [social workers often recognized as experts in assessing risk].) In light of the CSW's recommendation and mother's own assessment of what was best for K.M., we conclude that the record supports the court's exercise of discretion.

Father contends that awarding joint custody at this stage will preclude his ability to seek a modification of the order in family court. Father points out that any modification request in family court must be based upon a significant change of circumstances and the best interests of the child. (Welf. & Inst. Code, § 302, subd. (d); Fam. Code, § 3021.) He argues that mother's "mental health issues" can never be considered a significant change in circumstances because they existed at the time of the juvenile court's decision that joint custody was appropriate. The practical effect, he contends, is that mother's interests have been given greater protection than K.M.'s. We disagree. Necessarily implied in the court's order is a finding that mother's occasional moderate depression did not limit her ability to participate in decisionmaking. Thus, any inability to participate in decisionmaking in the future would be evidence of a significant change in circumstances.

Father has presented no basis to find that the court's order awarding joint custody to mother and father was arbitrary, capricious, or patently absurd. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) We thus conclude that the juvenile court did not abuse its discretion.

DISPOSITION

The order terminating jurisdiction and awarding joint legal custody is affirmed.

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O'NEILL, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.